

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS ALFREDO POOL,

Defendant and Appellant.

H045567

(Santa Clara County
Super. Ct. No. C1769254)

A jury convicted appellant Carlos Alfredo Pool of falsely imprisoning his wife and of assaulting her with a deadly weapon. The jury also found true an allegation that he used a deadly weapon in the commission of the false imprisonment. Pool contends on appeal that we must reverse the conviction for assault and the true finding on the enhancement due to insufficient evidence and erroneous jury instructions; the trial court erred in not instructing the jury on the lesser included offense of simple assault; and the statute providing for pretrial mental health diversion retroactively applies to him.

For the reasons explained below, we reject Pool's claims of insufficient evidence and instructional error. We agree that a limited remand is appropriate for the purpose of determining his eligibility for pretrial mental health diversion.

I. FACTS AND PROCEDURAL BACKGROUND

A. Procedural History

The Santa Clara County District Attorney filed an amended information charging Pool with crimes against his wife, Kari.¹ Count 1 alleged that on or about July 15, 2017, Pool assaulted Kari with a deadly weapon, a hammer (Pen. Code, § 245, subd. (a)(1)²). Count 1 further alleged that Pool personally inflicted great bodily injury on her under circumstances involving domestic violence (§§ 12022.7, subd. (e), 1203, subd. (e)(3).) Count 2 alleged that, on or about July 17, 2017, Pool falsely imprisoned Kari (§§ 236-237), and that during the commission of that crime he personally used a deadly and dangerous weapon, a knife (§ 12022, subd. (b)(1)). Count 3 alleged that, on or about July 15, 2017, Pool inflicted corporal injury on Kari (§ 273.5, subd.(f)(1)) and that he personally inflicted great bodily injury upon her (§§ 12022.7, subd.(e), 1203, subd. (e)(3)). The information also alleged two prior felony convictions for which Pool had served a prison term (§ 667.5, subd. (b)).

Pool was tried before a jury in November 2017. The jury found Pool guilty of assault with a deadly weapon (count 1), but it found not true the allegation that he personally inflicted great bodily injury on her. The jury also found Pool guilty of felony false imprisonment (count 2), and it found true the allegation that he personally used a deadly or dangerous weapon in the commission of that offense. The jury was unable to reach a verdict on count 3, and the trial court declared a mistrial on that charge and later dismissed it. Pool waived his right to a jury trial on the allegations, and the trial court found true both allegations that Pool had previously been sentenced to a term of imprisonment. (§ 667.5, subd. (b)).

¹ To protect the victim's privacy, we refer to her by her first name only. (Cal. Rules of Court, rule 8.90(b)(4).)

² Unspecified statutory references are to the Penal Code.

In February 2018, the trial court imposed a sentence of three years on count 1, a one-year consecutive sentence on count 2, and a one-year consecutive sentence for one of the prison priors.³ The trial court also imposed a one-year consecutive term for the enhancement for his personal use of a knife in the commission of the false imprisonment (§ 12022, subd. (b)(1)).⁴ The trial court sentenced Pool to an aggregate prison term of five years and eight months, imposed fines and fees, and ordered restitution. Pool timely appealed the judgment.

³ At the sentencing hearing on February 8, 2018, the trial court did not mention the second prison prior. There is a “corrected” minute order, dated February 9, 2018, which asserts that during the sentencing proceeding the trial court dismissed one of the prison priors. However, according to the reporter’s transcript from the sentencing, the trial court did not discuss the second prison prior at all. “Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.” (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) But neither party raises the issue of the trial court’s treatment of the enhancement, and, as described below, the trial court apparently resentenced Pool in July 2018. As the record on appeal does not contain any information about that proceeding, we do not know if the trial court addressed the second prison prior at that time. (See fn. 4, *post*.)

⁴ The one-year term imposed by the trial court on this enhancement was an error. Because the enhancement attached to a subordinate, consecutive term, the trial court should have imposed a term of four months (one-third of the one-year enhancement). (See § 1170.1, subd. (a) [providing “[t]he subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses”].) Pool’s appellate counsel asserts that in July 2018 the trial court resentenced Pool to a term of five years. The record on appeal does not include any information about this subsequent resentencing, and we are therefore unable to determine if the trial court addressed any sentencing errors at that time. In any event, Pool does not challenge his sentence, and neither party contends the trial court imposed an unlawful sentence on Pool.

B. The Evidence Presented at Trial

1. The Prosecution Evidence

Kari's testimony at trial in November 2017⁵ was that she had largely fabricated her July statements to the police. Therefore, a recording of Kari's emergency call on July 18 and a video recording of her police interview that day constituted the bulk of the prosecution's evidence against Pool.

On the night of July 18,⁶ at 7:35 p.m., Kari called the police to report a crime committed against her by her husband, Pool.⁷ Kari told the dispatcher, "I'd like to report a domestic violence going on." When asked by the operator what was happening, Kari said, "I'm the victim."

Kari told the operator her husband was "very violent" with her and "broke my ankle over the weekend with a hammer." He had used the "end of the hammer, the wooden part," and that he "shattered" her right anklebone. Kari described Pool as "extremely controlling."

When the dispatcher asked her if there were any weapons involved, Kari responded that there were "long knives, one's a machete maybe, and the other one's a small Japanese sword." She stated she was "scared for my life, 'cause he's got . . . [k]nives in the house."

Kari told the emergency responders if they were to ask her to come out it would take her "a little while to get to you" because Pool had broken her other crutch and, if "they go in our room, they'll see one of the crutches [is] broken." The dispatcher told

⁵ All dates occurred in 2017 unless otherwise indicated.

⁶ The amended information for count 2 incorrectly alleged that the date of Kari's false imprisonment occurred "on or about July 17" rather than on July 18, the day she called 911. Pool does not challenge this discrepancy on appeal.

⁷ The trial court admitted a recording of the call into evidence, which was played to the jury. The jury was given a transcript of the call, which was marked for identification but not admitted into evidence. We have listened to Exhibit 8 and have quoted from the transcript of the call in our recitation of the facts.

Kari the officers wanted to know if she could meet them at another location and asked her if she could walk out from her neighbor's house. Kari told the dispatcher she would try to walk into the courtyard.

Steven Jeffrey was a police officer with the San Jose Police Department. He was on duty on July 18 and was dispatched in response to Kari's call. He and another officer found Kari in an open courtyard area holding one crutch. The prosecution introduced into evidence excerpts from the video and audio footage from one of the officer's body-worn cameras. The video shows Kari crying as she spoke with the officers.

Kari told the officers that Pool was "very violent" and had broken her crutch and her ankle over the weekend with the end of a hammer. Kari stated that on Saturday night⁸ Pool had accused her of cheating, got violent, and was "swinging" a hammer at her. It was a large "old school" hammer made of "heavy wood." The "top part" of the hammer came off "and he took the end of it, and said smack, and he hit me directly on my ankle" and "I screamed." She was sitting on the bed when this occurred, and Pool "whacked [her] again" with the end of the hammer. Although she told Pool something was wrong with her ankle and "we need to go to the hospital," Pool initially refused to take her to the hospital.⁹

Officer Jeffrey asked Kari what had happened "here tonight." Kari told them that she and Pool were "in the room" and they were in the same bed when they woke up. Pool wanted her to get drugs. When she told him she could not get any because she did

⁸ We take judicial notice that July 18, 2017, fell on a Tuesday. (See Evid. Code, §§ 452, subd. (h), 459, subd. (a).)

⁹ The prosecution introduced into evidence medical records reflecting that Kari was admitted to a hospital in San Jose on July 16 for an ankle injury and diagnosed with a right distal fibula fracture. Various physicians from the hospital testified at trial, including Dr. John Pia, who was the emergency room doctor working on July 16. Dr. Pia testified that Kari was given a soft cast based on the swelling and was provided crutches. The physicians testified they could not opine on what caused Kari's fracture, though Dr. Pia testified it was "conceivably possible" it was caused by a strike from a wooden object.

not have a phone, he “put[] me in the room with him, [and] I [was] trapped.” Kari explained that Pool kept the door between their bedroom to the bathroom “always” locked. She was “cornered,” and the only reason she was able to get out of the room was because Pool got into the shower.

Officer Jeffrey and Kari had the following exchange about Pool’s use of a knife that day.

“Jeffrey: So did, has he hit you or anything today at all?

“[Kari]: Um, no, but he’s threatened me, and he’s swung his knives at me . . .

“Jeffrey: Well, how did he threaten you?

“[Kari]: With his knives. [¶] . . . [¶]

“Jeffrey: Explain, explain to me, okay, explain to me how that whole transaction transpired. And that happened today, right?

“[Kari]: Yeah, it’s just a lotta arguing, um, if you come, go into our bedroom, the coffee table has a buncha like wood is missing from it, it’s ‘cause he took the black knife and he just fuckin’ whacked at it a couple times, he’s like, you, he’s all, I fuckin’ hate you. [¶] . . . [¶]

“Jeffrey: Was he holding the knife in his hands?

“[Kari]: Yes.

“Jeffrey: Or what? I mean, what’s he doing with the knife?

“[Kari]: He holds it like, like he’s gonna go towards me, but then he’ll smack something else sometimes, but”

She added that the same knife had made a scar on her elbow in Idaho, and she “made a report on him in Idaho.”

Following her exchange with the responding officers, Kari went to the hospital by ambulance for reassessment of her right ankle. The hospital physician diagnosed her with a right ankle fracture and testified at trial that he did not observe Kari to be under the influence of a narcotic when he spoke with her at the hospital. New x-rays were taken,

and a radiologist observed that the fracture appeared the same as it had in the prior x-ray film done on July 16.

Pool barricaded himself in the house for several hours. Following the deployment of noise flash devices by the police, Pool exited the house on July 19 and was arrested.

Officer John Tompkins of the San Jose Police Department collected evidence on July 19 from the house in which Pool and Kari resided. He found and photographed a broken crutch in the upstairs bedroom. In the same bedroom, Officer Tompkins found and photographed a knife that looked “like a short sword” and a heavy wooden hammer handle.¹⁰ During Officer Tompkins’ testimony at trial, the knife and hammer handle were displayed to the jury and admitted into evidence; photographs of them were also admitted.

Kari testified at trial. She denied the truth of what she had told the emergency dispatcher and the officers in July. Explaining her ankle injury, she testified that, on July 15, she had gone to a night club, was drinking, and twisted her ankle as she was leaving the club. She stated that Pool had never been violent with her, although she admitted that he had punched holes in the wall on occasion and was controlling over who she was “hanging out with.” She further testified that she had fabricated the “story” of him using the hammer handle on her because she was angry at Pool for his “lies and cheating” and wanted the police to arrest him. She said “there was never an incident on that night.” When asked by the prosecutor, “Is it your testimony that the defendant never once struck you with a hammer?,” Kari responded “Yes.”

Kari agreed that she had talked “a lot” with the responding officers on July 18, and that she told them Pool was swinging the hammer and that the hammer head fell off but denied saying it happened the night she and Pool were “at a club.”

¹⁰ Officer Tompkins also photographed a broken kitchen knife.

Regarding Pool's use of a knife or knives, Kari testified that she and Pool had a collection of knives in the house, but she did not recall either telling police Pool was swinging knives at her, or that Pool had cut her elbow with a knife in the past. She did remember Pool taking a black knife and striking the coffee table with it. Regarding the knife with a black handle that was found on the floor in their bedroom, Kari testified that Pool did not use this knife, and that it was a "display" knife that hung on a wall.

At trial, Kari admitted she had spoken frequently with Pool following his arrest and incarceration, in spite of the protective order issued by the trial court that prohibited him from communicating with her. Prior to Kari testifying, Pool had told her not to get her words "mixed up."

The jury also heard evidence of other acts of prior domestic violence by Pool. Kari testified that Pool was convicted in Idaho (where they resided at the time) of domestic violence against her. Another of Pool's former partners and the mother of some of his children testified about emotional and physical abuse Pool had inflicted upon her. Kari's and Pool's former neighbor testified that she made two 911 calls in late 2016 related to their residence.¹¹

2. Defense Evidence

Dr. Elaine Chiu, an emergency medicine physician with an additional degree in bioengineering, testified for the defense as an expert in "injury biomechanics." She reviewed the police report, hospital records, and x-ray images of Kari's ankle from July 16 and July 18, 2017. Dr. Chiu observed that the "tip" of Kari's fibula bone was cracked but not displaced. She testified that "this type of fracture is consistent [with] what they call an avulsion of the distal fibula tip, pulling of the ligaments to pull the little piece

¹¹ Regarding the first call that she made in September 2016, the neighbor testified that she had heard banging on the walls and heard Kari say "stop." The neighbor made another call on December 24, 2016, because she was "concerned" and told the dispatcher that she observed the woman who lived next door had a "purple eye."

off.” Dr. Chiu opined that the mechanism of injury was consistent with “twisting of the ankle” and not any hammer handle strike or other “direct impact.”

3. Judicial Notice

At the prosecution’s request, the trial court judicially noticed two instances in which the trial court had ordered Kari to return to court and thereafter issued a body attachment after she failed to do so. The trial court told the jury “[y]ou are instructed to accept as fact these facts that I just indicated to you.”

4. Verdict

As described above, following deliberations, the jury found Pool guilty of assault with a deadly weapon (count 1) but found not true the allegation that he personally inflicted great bodily injury on Kari. The jury also found Pool guilty of felony false imprisonment (count 2), and it found true the allegation that he personally used a deadly or dangerous weapon in the commission of that offense. The jury did not reach a verdict on count 3.

II. DISCUSSION

Pool raises four claims on appeal. First, Pool contends that we must reverse his conviction for count 1 (assault with a deadly weapon, the hammer handle) and the enhancement to count 2 (based on his use of a knife during the crime of false imprisonment) because of insufficient evidence. Second, as to both count 1 and the enhancement to count 2, he claims the trial court erroneously instructed the jury that the hammer handle and knife were “inherently deadly” weapons. Third, as to count 1 only, Pool argues that the trial court erred by refusing to instruct the jury with the lesser-included offense of simple assault. Finally, Pool contends that, given the mental health conditions with which he has been diagnosed, his case should be remanded to the trial court for a hearing on his eligibility for pretrial mental health diversion pursuant to section 1001.36.

For the reasons explained below, we reject Pool’s challenges to the evidence and instructions. We agree that a limited remand is appropriate for the trial court to assess whether to grant Pool pretrial mental health diversion.

A. Sufficiency of the Evidence

Pool argues there is insufficient evidence to support either his conviction for count 1 or the jury’s true finding on the enhancement to count 2.

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 318.) “ ‘When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” (*People v. Powell* (2018) 5 Cal.5th 921, 944 [quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27].)

A reviewing court “presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) “[A]n appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury’s findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding.” (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139 (*Ceja*).) We do not reweigh the evidence or resolve conflicts in the testimony when determining its legal sufficiency. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Rather, before we can set aside a judgment of conviction for insufficiency of the evidence, “it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support [the jury’s finding].” (*People v. Rehmyer* (1993) 19 Cal.App.4th 1758, 1765.)

1. Assault with a Deadly Weapon

Pool contends insufficient evidence supports his conviction for assault with a deadly weapon, a hammer handle (§ 245, subd. (a)(1)). Pool concedes that there is some evidence that he used the hammer based on Kari's initial statements to law enforcement but nevertheless argues that this evidence is insufficient because "she did not indicate the manner in which [Pool] swung nor did she discuss the force with which [Pool] used the handle." Based on the absence of these details in Kari's statements, Pool argues, there was insufficient evidence that he used the hammer handle in a manner "likely" to inflict great bodily injury as required by section 245, subdivision (a)(1).

a. General Principles

The California Supreme Court has issued several recent decisions addressing the use of a deadly weapon in the context of section 245, subdivision (a)(1) (hereafter section 245(a)(1)). Under section 245(a)(1), "a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.'" [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue.' " (*People v. Aledamat* (2019) 8 Cal.5th 1, 6 (*Aledamat*)). "Because a knife can be, and usually is, used for innocent purposes, it is not among the few objects that are inherently deadly weapons." (*Ibid.*) Whether an object that is not inherently deadly or dangerous was used as a deadly weapon is a question of fact for the jury. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1027 (*Aguilar*)).

For an object to qualify as a deadly weapon based on how it was used, “the defendant must have used the object in a manner not only capable of producing but also *likely to produce* death or great bodily injury. The extent of any damage done to the object and the extent of any bodily injuries caused by the object are appropriate considerations in the fact-specific inquiry required by Penal Code section 245(a)(1). But speculation without record support as to how the object could have been used or what injury might have been inflicted if the object had been used differently is not appropriate.” (*In re B.M.* (2018) 6 Cal.5th 528, 530 (*B.M.*.)

“[T]he determination of whether an object is a deadly weapon under section 245(a)(1) must rest on evidence of how the defendant actually ‘used’ the object.” (*B.M.*, *supra*, 6 Cal.5th at p. 534.) “Although it is inappropriate to consider how the object could have been used as opposed to how it was actually used, it is appropriate in the deadly weapon inquiry to consider what harm could have resulted from the way the object was actually used. Analysis of whether the defendant’s manner of using the object was likely to produce death or great bodily injury necessarily calls for an assessment of potential harm in light of the evidence.” (*Id.* at p. 535.)

“Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate.” (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 748 (*McDaniel*) [citing *People v. Covino* (1980) 100 Cal.App.3d 660, 668].) “The focus is on the force actually exerted by the defendant, not the amount of force that could have been used.” (*McDaniel*, at p. 748.)

b. Analysis

With these principles in mind, we turn to the facts here. Kari told police Pool was swinging the hammer at her so that the “top part” came off. From this testimony, the injury could infer that Pool was swinging the object at her with significant force. She described the hammer as a large “old school” hammer made of “heavy wood,” suggesting that, if it hit her, it could cause serious injury. She further stated that Pool struck her

directly on the ankle when she was sitting on the bed, and he “whacked [her] again” with the end of the hammer.

In his argument that the evidence at his trial was insufficient, Pool relies primarily on the authority of *People v. Beasley* (2003) 105 Cal.App.4th 1078. However, *Beasley* does not support reversal here. In *Beasley*, the court held there was insufficient evidence that the defendant used either a broomstick or a hollow plastic vacuum cleaner attachment as a deadly weapon. (*Id.* at p. 1088.) In reaching that conclusion, the court relied in part on the fact that there was *no* evidence of the broomstick’s “composition, weight, and rigidity,” for example if it was made of solid wood rather than a hollow plastic tube. (*Id.* at pp. 1087–1088.) “The jury therefore had before it no facts from which it could assess the severity of the impact between the stick and [the victim’s] body.” (*Id.* at p. 1088.) Regarding the plastic vacuum part, the court in *Beasley* noted that neither the part nor a photograph of it were in evidence, but that it must have been “hollow to function as part of a vacuum cleaner” and “[s]triking an adult’s shoulder and back with a hollow plastic instrument is not likely to produce significant or substantial injury.” (*Ibid.*) Accordingly, the court in *Beasley* modified the judgment to reflect convictions for simple assault. (*Ibid.*)

Here, by contrast, the prosecution introduced the wooden hammer handle (and a photograph of it) into evidence. The jury was therefore able to assess its size and composition. In addition, Kari’s statement that Pool swung the hammer at her with such force that the “top part” came off, provides substantial evidence of the dangerous way in which Pool actually used the hammer. Kari told the officers that Pool hit her with the hammer handle, causing her to scream and beg for medical attention.

Pool attacks this evidence by arguing that Kari overreacted and that the evidence supports a finding that he gave just a “gentle smack” with the hammer handle. However, he ignores other evidence, such as the composition and size of the hammer handle and the way in which Pool used it. A reviewing court “may not reverse the judgment merely

because it believes that the circumstances might also support a contrary finding.” (*Ceja*, *supra*, 4 Cal.4th at p. 1139.)

Pool emphasizes that the jury found not true the allegation of great bodily injury in the enhancement to count 1. However, the actual occurrence of great bodily injury is not required for a conviction for section 245(a)(1). “One may commit an assault without making actual physical contact with the person of the victim; because the statute focuses on use of a deadly weapon or instrument or, alternatively, on force likely to produce great bodily injury, whether the victim in fact suffers any harm is immaterial.” (*Aguilar*, *supra*, 16 Cal.4th at p. 1028.) While the “extent of any bodily injuries caused by the object” is an appropriate consideration, the jury may also consider other factors “in the fact-specific inquiry required by Penal Code section 245(a)(1).” (*B.M.*, *supra*, 6 Cal.5th at p. 530.)

The jury was entitled to (and clearly did) believe that Pool swung a heavy wooden hammer at Kari, while concluding that the prosecution had not proven beyond a reasonable doubt that Pool’s striking her with the hammer handle caused the fracture to her ankle. Kari’s testimony about the manner and direction of the swinging and the actual weight and size of the hammer handle provide substantial evidence supporting Pool’s conviction for section 245(a)(1).

Having reviewed the evidence admitted in Pool’s trial in the light most favorable to the judgment, we conclude that the jury had substantial evidence before it to support a reasonable inference that Pool used the hammer handle as a deadly weapon in a manner likely to produce death or great bodily injury under section 245(a)(1). Accordingly, we reject Pool’s challenge to the sufficiency of the evidence for count 1.

2. Personal Use of a Deadly Weapon

The information alleged that Pool used a deadly weapon, a knife, in the commission of felony false imprisonment (count 2). The jury convicted Pool of false imprisonment (a finding he does not challenge) and also found true the allegation that he

used a knife (§ 12022, subd. (b)(1) (hereafter section 12022(b)(1))) in its commission. Pool argues he did not actually touch Kari with the knife and “[w]alking towards a person with a knife and not making any contact is not ‘likely to inflict great bodily injury.’ ” Thus, Pool contends there was no evidence to support the jury’s true finding for the section 12022(b)(1) enhancement.

Section 12022(b)(1) states that “[a] person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense.” “ ‘In order to find “true” a section 12022(b) allegation, a fact finder must conclude that, during the crime or attempted crime, the defendant himself or herself intentionally displayed in a menacing manner or struck someone with an instrument capable of inflicting great bodily injury or death.’ ” (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1197 (*Hajek and Vo*) [abrogated on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216] [citing *People v. Wims* (1995) 10 Cal.4th 293, 302].)

Although a knife is “not among the few objects that are inherently deadly weapons,” it may assume such characteristics depending on the manner in which it was used, and this rule applies to the weapon enhancement under section 12022(b)(1). (*Aledamat, supra*, 8 Cal.5th at p. 6.) As explained by the California Supreme Court, “[t]he weapon enhancement is for use of a ‘deadly or dangerous’ weapon (§ 12022, subd. (b)(1)), rather than specifically a deadly weapon, as under section 245, subdivision (a)(1). But the same rule appears to apply, as indicated by *McCoy*’s statement that ‘a knife is not an inherently dangerous or deadly instrument as a matter of law.’ ” (*Id.* at p. 6, fn. 2.) Cases analyzing the sufficiency of the evidence under section 245(a)(1), therefore, apply also to our inquiry here under section 12022(b)(1).

“ ‘ “We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.] Thus, we presume every fact in

support of the judgment the trier of fact could have reasonably deduced from the evidence.” ’ ’ (Hajek and Vo, *supra*, 58 Cal.4th at p. 1197 [quoting *People v. Wilson* (2008) 44 Cal.4th 758, 806].)

Applying these principles and having reviewed the entire record, we determine there is substantial evidence that Pool used the knife in a menacing manner towards Kari, and that the knife was capable of inflicting great bodily injury. Kari told responding officers that Pool “swung his knives at me.” She stated he had whacked a coffee table in their bedroom with “the black knife” and told her “I fuckin’ hate you,” “if I don’t knock it off, he’s gonna fuck me up” and that he would “beat the shit outta me.” She told the officers Pool was holding a knife in his hands “like he’s gonna go towards me, but then he’ll smack something else sometimes.” In their bedroom, an officer collected what he described as a “short sword.” In that same room, he also located and photographed a broken crutch, which was consistent with Kari’s account of the incident.

The knife was admitted into evidence and shown to the jury during Officer Tompkins’s testimony. The photograph of the knife was also admitted into evidence and reveals a long knife with a black handle and sharpened tip.

Based on the description Kari gave the police of the incident, the jury could reasonably have believed that Pool was within close distance of Kari, and she was trapped in the confines of their bedroom, when he was swinging the knife at her. Moreover, the jury could reasonably have inferred Kari was especially vulnerable to the knife swings given the ankle injury she sustained a few days prior and in light of her testimony that Pool had broken one of her crutches. The jury could assess for itself the size and composition of the knife.

Pool argues his case is analogous to a decision from Texas titled *Rivera v. State* (Tex.Ct.App. 2008) 271 S.W.3d 301. We are not persuaded this case is similar. The court characterized the evidence about the knife in that case as “meager.” (*Id.* at p. 305.) The victim in that case never saw the knife, and the weapon “was never recovered.”

(*Ibid.*) One witness described the knife as a “ ‘pocket knife,’ ” but there was no testimony about the “type of knife or the length of the blade.” (*Id.* at p. 305.) Furthermore, the seriousness of the victim’s wounds was not consistent with a factual finding that he had suffered serious bodily injury. (*Id.* at p. 306.) Under those facts, the court concluded “the evidence that Rivera used a deadly weapon—a weapon with the capacity to cause serious bodily injury or death—is so weak that the verdict is clearly wrong and manifestly unjust.” (*Ibid.*)

In contrast to *Rivera*, the evidence here is substantial. The knife itself, which an officer located on the bedroom floor shortly after the incident, was shown to the jury and admitted into evidence. The photograph in evidence depicts a large and pointed knife and corroborates the officer’s description of it as a “short sword.”

Pool also emphasizes that there is no evidence he touched Kari with the knife or injured her with it. Although it is relevant that the knife did not injure Kari, this fact is not dispositive to whether Pool used it as a deadly weapon. In deciding whether the knife was used in manner likely to cause great bodily injury, a fact finder may consider the injury that *likely* would have resulted from the way defendant used the knife. (*B.M.*, *supra*, 6 Cal.5th at p. 535.)

In *B.M.*, a case involving the use of a knife, the California Supreme Court determined the evidence was insufficient to show a defendant used a butter knife against her sister’s blanketed legs in a manner that was likely to produce death or great bodily injury. (*B.M.*, *supra*, 6 Cal.5th at p. 536.) The court relied on several circumstances to support that conclusion, namely that the butter-knife was “not sharp and had slight ridges on one edge of the blade,” that defendant only used the knife on her sister’s legs, which were covered by a blanket, there was no evidence that defendant attempted to use the knife on any exposed part of her body, and the “moderate pressure that [defendant used] was insufficient to pierce the blanket much less cause serious bodily injury to [the victim].” (*Ibid.*)

The circumstances here are distinctly different. Unlike the butter knife in *B.M.*, the knife was an object akin to a “short sword” with a long, sharp, and smooth blade. Moreover, based on Kari’s statements to the officers immediately following the incident, the jury could reasonably infer that Pool had swung the knife at Kari and threatened her with it in the confines of the upstairs bedroom in which she was trapped and suffering from a fractured ankle.

For these reasons, we conclude substantial evidence supported the jury’s true finding that Pool personally used a “deadly or dangerous weapon in the commission of a felony” under section 12022(b)(1).

B. Instructional Error

Alternatively, Pool contends that the instructions provided to the jurors violated his right to due process because they wrongly suggested that the knife and hammer handle were “inherently deadly” objects. The instructions given to the jury provided in pertinent part that a deadly weapon “is any object, instrument, or weapon [other than a firearm] that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury” (CALCRIM No. 875). Similarly, the instruction for the allegation in Count 2 provided that “[a] deadly or dangerous weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury” (CALCRIM No. 3145).

A hammer handle and knife are not inherently dangerous weapons, and the Attorney General concedes the inclusion of the phrase “inherently deadly” in the instructions was erroneous. Nevertheless, the Attorney General contends that any error was harmless. “That narrow question turns on a two-step inquiry: (1) whether the error was factual error or legal error; and (2) what prejudice standard applies.” (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 318.)

In the recent decision of *Aledamat* (issued after briefing was completed in this appeal) the California Supreme Court addressed both questions.¹² In that case, the jury (as here) had been instructed using CALCRIM No. 875 and CALCRIM No. 3145 to evaluate whether the defendant had committed assault with a deadly weapon (a box cutter) and personally used the box cutter in the commission of a criminal threat. (*Aledamat, supra*, 8 Cal.5th at pp. 4–5.) The California Supreme Court concluded the portion of these instructions referring to an “inherently deadly” weapon was a legal error. (*Id.* at p. 8.) Turning to the question of prejudice, the California Supreme Court held that “the usual ‘beyond a reasonable doubt’ standard of review established in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) for federal constitution error applies. The reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt.” (*Id.* at p. 3.)

The Supreme Court determined in *Aledamat* that the legal error was harmless. It relied on several circumstances to reach that conclusion. First, it noted that the instruction also required the jury to “consider all of the circumstances in deciding whether the object was a deadly weapon, *either* inherently *or* as used.” (*Aledamat, supra*, 8 Cal.5th at p. 14.) “Given this additional instruction, it seems unlikely the jury would simply view the box cutter as inherently deadly without considering the circumstances, including how defendant used it.” (*Ibid.*) Second, it focused on the arguments made by counsel and noted that “no one ever suggested to the jury that there were two separate ways it could decide whether the box cutter was a deadly weapon,” and that “counsel never argued that, if he did assault the victim with the box cutter, the box cutter was not a deadly weapon.” (*Ibid.*) Rather, defense counsel argued that “defendant did not assault

¹² We sought and received supplemental briefing from the parties on the applicability to this appeal of the California Supreme Court’s decision in *Aledamat*.

the victim at all.” (*Ibid.*) Based on those circumstances, the Supreme Court held the error was harmless beyond a reasonable doubt.

Each of the circumstances the California Supreme Court cited in *Aledamat* as leading to a conclusion of harmless error applies here. The instructions (CALCRIM Nos. 875, 3145) were identical to those in *Aledamat*. While the Supreme Court noted the instructions were “problematic” (*Aledamat, supra*, 8 Cal.5th at p. 15) and suggested they be modified going forward by “simply deleting any reference in the usual case to inherently deadly weapons,” (*id.* at p. 16) it noted that the overall language in the instructions, particularly in CALCRIM No. 3145 that the jury consider “all of the circumstances,” provided the correct analysis to the jury. (*Aledamat*, at p. 14.)

Moreover, as in *Aledamat*, trial counsel here did not suggest that there were two separate ways the jury could find the hammer handle or knife were deadly weapons. The prosecutor emphasized in both opening and closing arguments *the manner* in which Pool used the objects, such as that he was “swinging” the hammer until the end flew off and was “swinging knives,” rather than arguing that the hammer handle and knife were inherently deadly. Pool’s defense counsel—like the defense counsel in *Aledamat*—relied on the defense that, while Kari and Pool may have had a volatile relationship, no crime occurred. Defense counsel did not argue that the prosecution had failed to meet its burden of proof on the ground that either the knife or hammer handle was not an inherently deadly weapon. Therefore, applying the reasoning and analysis in *Aledamat*, the legal error in the instructions given to Pool’s jury was harmless beyond a reasonable doubt.

C. Lesser Included Offense

Pool argues the trial court committed instructional error when it concluded that it need not give an instruction on simple assault as a lesser-included offense to assault with a deadly weapon, as charged in count 1. Pool contends the jury could have believed he struck Kari with a hammer handle “but did not use force likely to inflict great bodily

injury.” Pool maintains such error was prejudicial, as evidenced by the jury’s two-day deliberation and its rejection of portions of the prosecution’s theory, shown by its failure to convict on count 3 and not true finding for the allegation in count 1 that Pool personally inflicted great bodily injury. The Attorney General responds that there was no duty to instruct because the instruction was not supported by substantial evidence and, even if the trial court erred, any such error was harmless.

A trial court has a “duty to instruct on ‘all theories of a lesser included offense which find substantial support in the evidence.’ ” (*People v. Rogers* (2006) 39 Cal.4th 826, 866–867 (*Rogers*).) Substantial evidence is evidence from which a jury could conclude “that the defendant committed the lesser included offense and not the greater offense.” (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196.) “In deciding whether evidence is ‘substantial’ in this context, a court determines only its bare legal sufficiency, not its weight.” (*People v. Breverman* (1998) 19 Cal.4th 142, 177, [abrogated on another ground by statute].)

Pool argues the trial court erred by failing to instruct the jury on simple assault under section 240. We review de novo the trial court’s failure to instruct the jury on a lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366.) “Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of.” (*Rogers, supra*, 39 Cal.4th at p. 868.)

“Section 240 defines the crime of simple assault as ‘an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.’ . . . No actual touching is necessary, but the defendant must do an act likely to result in a touching, however slight, of another in a harmful or offensive manner.” (*People v. Wyatt* (2012) 55 Cal.4th 694, 702.) It is well-established, and the parties do not dispute, that simple assault is a lesser included offense of assault by the use of a deadly weapon. (§ 245(a)(1); see *McDaniel, supra*, 159 Cal.App.4th at p. 747.) Therefore, the issue raised by Pool’s claim “is whether a reasonable jury could have found that defendant

committed only a simple assault and not an assault with a deadly or dangerous weapon or force likely to produce great bodily injury.” (*Id.* at p. 748.)

For the jury to have convicted Pool solely of simple assault, it would have had to find that Pool assaulted Kari by swinging the hammer handle at her but did so with force that was *not* likely to produce great bodily injury. However, there was no evidence from which the jury could conclude that Pool swung the hammer at Kari on July 15 using varying levels of force.

In her statement to the officers, Kari only described Pool swinging the hammer at her in one way. She stated “he at first was swinging the hammer at me, and I was freaking out.” “He was swinging the hammer around, and then I told him . . . don’t, and then so he put it down, and at one point, he, the, it’s a, a large, it’s like a large hammer, but it’s an old school um, heavy wood ones. So the top part came off, and he took the end of it, and said smack, and he hit me directly on my ankle. I screamed”

At trial, Kari testified that Pool did not swing a hammer at her on July 15. She said “there was never an incident on that night.” Kari testified she was the one who hit the kitchen table with the hammer (although her testimony was not specific about the timing of that event). Kari said she made up the story about the hammer that she told the police. When asked by the prosecutor, “Is it your testimony that the defendant never once struck you with a hammer?,” Kari responded “Yes.”

Therefore, the jury had before it no evidence that Pool committed simple assault against Kari by swinging a hammer handle at her with force that was less than likely to produce great bodily injury.¹³ The only testimony about Pool’s swinging the hammer

¹³ In his reply brief, Pool identifies a scenario he claims would support a simple assault charge, namely that Pool struck Kari with the hammer with minimal force, and she separately twisted her ankle causing her injury. Pool fails to provide any evidence supporting these facts, and we cannot on this basis conclude the trial court erred in failing to give the instruction. (See *People v. Wyatt* (2012) 55 Cal.4th 694, 704 [holding it would be “speculative at best to construe the trial evidence in this case as supporting a

handle came from Kari, and she described it only one way. Either the jury believed her account to the officers in July that Pool forcefully swung the hammer handle at her, or they believed her trial testimony that the incident never occurred (in which case they would have acquitted Pool of count 1).

While the jury found not true the enhancement related to the injuries suffered by Kari, this evidence does not go to the manner in which Pool swung the hammer. Instead this finding shows the jury did not believe that the prosecution had proven beyond a reasonable doubt that Pool injured Kari. The defense expert testified that Kari's ankle injury was most likely the result of her rolling her ankle, which was not necessarily caused by Pool's swinging the hammer handle at her. The jury's findings suggest it credited this testimony. However, this conclusion does not affect the analysis of whether the trial court should have instructed on simple assault, because actual injury is not an element either of assault with a deadly weapon or of simple assault.

The sole fact relevant to whether the trial court should have instructed on simple assault is how Pool swung the hammer handle at Kari. The jury heard only from Kari on that question. She originally described one kind of swinging and then denied it had occurred at all. "[U]nder the evidence as above detailed the appellant was either guilty of an offense more serious than a simple assault, or he was not guilty." (*People v. McCoy* (1944) 25 Cal.2d 177, 193–194.) Therefore, we conclude the trial court did not err in declining to instruct on the crime of simple assault.

D. Mental Health Diversion Under Section 1001.36

Pool asserts that the judgment should be conditionally reversed and his case remanded for a hearing to determine his eligibility for pretrial mental health diversion

verdict of only simple assault"). We note that, when asked by the trial court for evidence that supported a lesser included charge, defense counsel could not articulate evidence related to defendant attacking Kari other than Pool striking her with the hammer handle.

under section 1001.36, which was enacted during the pendency of this appeal. He argues that he was diagnosed as a teenager as bipolar, schizophrenic, and with post-traumatic stress disorder. These diagnoses are reflected in his probation report. The Attorney General does not on appeal dispute these diagnoses but rather argues that section 1001.36 is not retroactive.

This court has previously concluded that section 1001.36 applies retroactively to cases not yet final on appeal. (*People v. Weaver* (2019) 36 Cal.App.5th 1103, 1122 (*Weaver*).) Pool was convicted in November 2017, and the statute took effect in June 2018. (*Id.* at p. 1113, fn. 10.) Following *Weaver*, we conclude that section 1001.36 applies retroactively to Pool. We next address whether remand is appropriate under the facts here.

As we stated in *Weaver*, “remand is appropriate when ‘the record affirmatively discloses that [the defendant] appears to meet at least one of the threshold requirements’ of section 1001.36, subdivision (b)(1).” (*Weaver, supra*, 36 Cal.App.5th at p. 1121 [quoting *People v. Frahs* (2018) 27 Cal.App.5th 784, 791, rev. granted].) As in *Weaver*, the record here affirmatively discloses that Pool meets at least one of the threshold requirements, namely, he suffers from a diagnosed mental health disorder. (See § 1001.36, subd. (b)(1)(A).)

Therefore, we conditionally reverse the judgment and remand the matter to the trial court with directions to hold a hearing under section 1001.36 to determine whether to grant Pool diversion under that statute. If the trial court grants diversion, it shall proceed in accordance with that statute. If Pool performs satisfactorily in diversion, the trial court shall dismiss the charges. (§ 1001.36, subd. (e).) If the trial court does not grant diversion, or if it grants diversion but Pool does not satisfactorily complete diversion (§ 1001.36, subd. (d)), then the trial court shall reinstate the judgment.

III. DISPOSITION

The judgment is conditionally reversed. The matter is remanded to the trial court with directions to hold a hearing under Penal Code section 1001.36 to determine whether to grant Pool diversion under that statute. If the trial court grants diversion, it shall proceed in accordance with that statute. If Pool performs satisfactorily in diversion, the trial court shall dismiss the charges. (Pen. Code, § 1001.36, subd. (e).) If the trial court does not grant diversion, or if it grants diversion but Pool does not satisfactorily complete diversion (Pen. Code, § 1001.36, subd. (d)), then the trial court shall reinstate the judgment.

DANNER, J.

WE CONCUR:

BAMATTRE-MANOUKIAN, ACTING, P.J.

GROVER, J.

H045567
People v. Pool